

Claimants engaged in a 17-day strike against an employer that provided a critical public service function. In light of substantial disruption to the internal business operations, labor dispute held to be a work stoppage.



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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Introduction and Procedural History of this Appeal

The claimant employees of XXX Electric & Gas Corporation ("Employer"), members of the Utility Workers Union of America, Local 369 ("claimants"), appeal a decision by the Determinations Department of the Division of Unemployment Assistance (DUA) to deny unemployment insurance benefits under G.L. c. 151A, §25(b). We review pursuant to our authority under G.L. c. 151A, § 41(d) and affirm.

In a determination issued on August 17, 2005, benefits were denied after the DUA determined that the claimants' participation in a labor dispute strike during the period from May 15, 2005 to June 1, 2005 constituted a work stoppage. The claimants appealed, and the DUA referred the case directly to the Board as permitted under G.L. c. 151A, § 39(d). Through counsel, the parties submitted a joint Stipulation of Facts and waived their right to a hearing. Our decision is based upon our review of the parties' Stipulation of Facts and briefs.

The issue on appeal is whether a labor dispute, which resulted in the claimants' unemployment, caused such a substantial curtailment of the employer's business operation as to amount to a stoppage of work.

The Parties' Stipulation of Facts¹

Set forth below in their entirety are the stipulated facts agreed to by the parties and submitted to the Board.

(1) Employer is a holding company engaged through its subsidiaries in the transmission and distribution of electricity and natural gas to residential and business customers throughout Eastern Massachusetts.

(2) [YYY] and all the other claimants are or were at all times material herein employees of [employer] and members of the Utility Workers Union of America, Local 369 ("Local 369").

(3) At midnight, May 15, 2005, the claimants and all members of Local 369 employed by [employer] (a total of approximately 1900 employees) commenced a strike against [employer]. One Local 369 member returned to work during the first week of the strike. The strike commenced when [employer] and Local 369 were unable to agree to terms on a new collective bargaining agreement to succeed the agreement that expired immediately prior to the commencement of the strike. In dispute were retiree health benefits, dedicated preventive maintenance crews, staffing levels, wages, and other compensation and benefit issues.

(4) [Employer] discontinued health and dental insurance for Local 369 members who were on strike throughout the duration of the strike but [employer] honored all claims for medical and dental services rendered to striking workers and their dependents during the strike.

(5) At the beginning of the strike, [employer] mailed employees represented by Local 369 a postcard and stated: "As you are probably aware, employees are not required to honor a strike. If you wish to return to work, please contact ... to make the necessary arrangements." One Local 369 member returned to work before June 2, 2005.

(6) The strike continued until the terms of a new collective bargaining agreement were reached by [employer] and Local 369 and ratified by members of Local 369 on June 1, 2005. Thus, the strike period or the period of the strike was May 16, 200[5] through June 1, 200[5]. With [employer]'s permission, some employees were permitted to absent themselves from work after the strike had ended until Monday, June 6, 2005.

(7) Additionally, 252 employees of [employer] represented by the United Steelworkers of America, local 12004 ("Local 12004"), engaged in a refusal to cross picket lines (sympathy strike) for three days during the first week of the strike. Local 12004 staffing levels were consistent in the two weeks prior to the strike period and during the strike period, as set forth in Exhibit "A" [not] attached hereto. Thereafter, with the exception of holidays, vacations, and absenteeism unrelated to the strike, employees represented by Local 12004 worked during the remainder of the strike period.

(8) During the period of the strike, approximately 834 management employees and 43 non-union employees continued to work. Many, if not all, of these employees worked increased hours and days during the strike period. During the strike period, management personnel performed some of the work functions that were usually performed by Local 369 members in addition to some of the work functions they normally performed. [Employer] [did] not maintain records that show the number of hours management personnel spent during the strike period performing their normal work functions or the work functions usually performed by Local 369 members.

(9) The total number of payroll hours worked on a weekly basis during the month of May, 2005, and the first week of June, 2005, for all non-striking employees, including management employees, was as follows:

Payroll End Date	Hours
May 7, 2005	118,022.24
May 14, 2005	120,681.58
May 21, 2005	60,758.50
May 28, 2005	64,476.00
June 4, 2005	73,420.90*

* This number includes payment of 7,999.50 hours in holiday pay for the Memorial Day holiday on Monday, May 30, 2005.

(10) Staffing levels before and during the strike were as set forth in Exhibit "A" [not] attached hereto.

(11) Revenues for [employer] in the last two (2) weeks of May, 2005 were 2% lower as compared to the same period in 2004. See Exhibits "B," "C," and "D," [not] attached hereto. Revenues for [employer] in the first two (2) weeks of May, 2005 were 7.2 percent lower as compared to the same period in 2004. See Exhibit "B."

(12) [Employer] read 77.5% of its meters from May 15, 2005 through June 3, 2005. See Exhibit "G" [not] attached hereto. [Employer] experienced an average of one-half (1/2) day delay in mailing bills to customers; most customers were billed, albeit on an estimated basis, during the strike period. It also experienced a delay in billing 25% of its Time of Use (TOU) customers due to the inability to obtain read data; the average time between meter read and [billing] was 2.26 days. [Employer] estimated some TOU customers during the strike period. The estimates caused additional re-work when the actual data was collected; the estimates were reversed and the customers re-billed based on the actual values. Less than 1% of customers were re-billed. [Employer] also deterred normal managerial and analysis activity as those normally performing this work were reassigned to reading activity.

(13) [Employer] halted all customer shut-offs for non-payment on May 11, 2005, and did not resume this work until June 6, 2005. [Employer] normally shut off approximately 1,700 customers during that time period in previous years.

(14) In February, 2005, [employer] sent 168,802 credit notices to customers. In March, 2005, [employer] sent 181,918 credit notices to customers. In April, 2005, [employer] sent 82,195 credit notices to customers. In May, 2005, [employer] sent 124,000 credit notices to customers.

(15) In February, 2005, [employer] collection agencies collected \$33.2 million. In March, 2005, [employer] collection agencies collected \$45.4 million. In April, 2005, [employer] collection agencies collected \$26.8 million. In May, 2005, [employer]'s collection agencies collected \$17.1 million.

(16) [Employer] curtailed all Revenue Protection Investigations from May 16, 2005, until June 6, 2005. In this time period, [employer] would normally have investigated 50 cases of reported theft and back billed approximately \$150,000.

(17) During the period May 16 – May 31, 2005, new work orders were written in the new customer work area. No work was done on those orders by Engineering or Construction during that period. During this same period, 668 work orders passed their due dates in the Engineering (434) and Construction (234) areas. [Employer] [did] not maintain the same data for the comparable time period in 2004.

(18) During the period May 16 – June 6, 2005, a total of 854 Customer Work Orders were received. An estimate of the lost revenue from the delay in completing these orders is set forth in Exhibit "E" [not] attached hereto. The estimates of revenue lost are based on 2004 figures.

(19) For the three (3) months prior to the strike and the period of the strike, production/service data and matrixes broken down by department [are] as follows:

Corporate Relations	See Exhibit "F"
Customer Care	See Exhibits "G"* and "H"
Operations Support – Weekly Fleet Workload	See Exhibit "I"
Electric Operations & Engineering	See Exhibits "J," "K,"† & "L" ‡
Finance & Accounting	See Exhibits "M," "N," & "O"
Gas Operations	See Exhibits "P" & "Q"
Human Resources	See Exhibits "R," "S," & "T"
Information Services – Technology Business Improvements	See Exhibit "U"
Strategy, Law & Policy – Delayed Findings	See Exhibit "V"

* [employer] does not track or measure a sixty (60) second call answer rate; for the reporting year 2005, [employer] was required to report to the state DTE the percent calls answered in thirty (30) seconds or less.

† This exhibit includes the hours worked by management personnel, including the extra hours worked by management employees during the strike period.

‡ This exhibit includes the hours worked by management personnel, including the extra hours worked by management employees during the strike period.

(20) Exhibit "W" constitutes a summary of the work functions that were being performed by management personnel during the strike period by major department. [Employer] [did] not maintain records that show the number of hours by work function that were being performed by management personnel during the strike period by major department.

(21) Exhibit "X" constitutes a summary of work functions that were not being performed by management personnel during the labor dispute by major department. [Employer] [did] not maintain records that show the number of hours by work function that would normally be performed by management personnel by major labor department.

(22) Exhibit "Y" constitutes a summary of work functions normally performed by employees who are members of Local 369 that were not being performed by management during the strike period by major department. [Employer] [did] not maintain records that show the number of hours by work function that Local 369 members would normally perform that were not being performed by management personnel or other non-striking employees during the strike period by major department.

(23) Exhibit "Z" constitutes a summary of work functions normally performed by employees who are members of Local 369 that were being performed by management personnel during the strike period by major department. [Employer] [did] not maintain records that show the number of hours by work function that management personnel performed during the strike period by major department.

(24) Exhibit "AA" constitutes a summary of work functions normally performed by employees who are members of Local 369 that were being performed by contractors during the strike period by major department. [Employer] [did] not maintain records that show the number of hours by work function normally performed by [Local] 369 members that contractors were performing during the strike period by major department.

(25) Exhibit "BB" constitutes a Contractor Summary for the labor dispute.

(26) Non-union staff generally perform work functions as follows:

- * Confidential – Administrative Assistance
- * Executive Secretaries – Administrative Support for Executive Staff (CEO/SVP/VP)
- * Administrative Assistance – Supporting all HR activities
- * Individual contributors (project managers, performance consulting, training, staffing)

During the period of the labor dispute, non-union staff was [sic] unable to perform the following functions:

- * Confidential – Administrative Assistance
- * Administrative Assistance – Supporting all HR activities

* Individual Contributors (Project managers, performance consulting, training, staffing, etc.)

(27) Due to an unexpected storm during the second week of the strike, various office work and activities that were planned were either delayed or canceled so that employees could be reallocated to the field to support field activity and respond to emergency conditions. There is no measure of the planned work and activities that were delayed or cancelled.

(28) [Employer] reported in its 10-Q filing to the SEC that during the first quarter of 2005, factors that contributed to the decrease in 2005 earnings (from 2004) were: "Higher operations and maintenance expense due to incremental costs associated with a strike by union employees (approximately \$2.3 million) and a net increase of approximately \$5 million for environmental costs; higher depreciation and amortization expense, excluding amortization expense related to securitization [of] transition property, that also reflects higher distribution and transmission property (\$1.5 million) primarily resulting from higher capital additions; and increased property tax expense and interest costs due to higher rates."

The Board's Findings of Fact

Based upon the evidence and arguments submitted to the Board, we make the following findings of fact. They are organized into three categories: "end production," "revenues," and "business operations," following the typology suggested by the Supreme Judicial Court in Boguszewski v. Commissioner of Department of Employment and Training, 410 Mass. 337 (1991).

End Production

1. [Employer] concedes in its brief, and the Board so finds, that the transmission and distribution of electricity and natural gas were not significantly impacted by the strike. (Brief of [XXX] Electric & Gas Corporation, page 11, hereinafter "[employer] brief, p. ____.")
2. [Employer] response rate to natural gas emergencies during the strike was maintained at 98.6% during the strike, which was within 1% of normal non-strike period performance. (Stip. Exh. P.)

Revenues

3. Revenues during the strike period dipped to 98% of revenues for the same period in 2004. However, revenues for the beginning of the month of May, 2005 had been down to 92.8% of the revenues in the same period in 2004. (Stipulation of Facts, number 11, hereinafter "Stip. # 11".)

4. Revenue collections on overdue accounts in the month of May, 2005 dropped to 55.9% of the average for the prior two months. (Stips. #13 – 15.)

Business Operations

5. With approximately 1,900 [employer] employees on strike and approximately 834 management and 43 non-union employees continuing to work, the company operated with 31.6% of its normal workforce during the strike. (Stips. #3, #8.)

6. During the two full weeks of the strike, May 15, 2005 to May 28, 2005, the number of payroll hours worked dropped to 52.5% of the number of hours worked in the prior two week period. (Stip. #9.)

7. Forty-five (45) work functions normally performed by union employees were not done at all during the strike, representing a 0% performance rate. Work ceased on the following: all routine and preventative maintenance; all low and medium priority corrective maintenance; capital construction; and all work on service orders for gas and electric customers' existing service installations, excepting those orders related to gas odors or emergencies. This demonstrates 0% performance in these areas. (Stip. Exh. Y.)

8. Ninety-five (95) functions in [employer's] major departments, which were normally performed exclusively by management, stopped entirely during the strike period, representing a 0% performance rate. The number of these work functions falls into the following departments: corporate relations (7), customer care (9), operations support (3), engineering (1), electric operations (1), finance and accounting (35), gas operations (4), human resources (16), information services (6), and strategy, law, and policy (13). (Stip. Exh. X.)

9. [Employer] did not perform any work on new customer work orders in its Engineering and Construction areas during the strike period. This reflected 0% of its normal activity. (Stip. #17.)

10. In anticipation of and during the strike, the period April – May, 2005, the average number of credit notices sent to customers dropped to 58.8% of normal. This was in comparison to the average number of credit notices issued in February and March, 2005. (Stip. #14.)

11. Also in anticipation of and during the strike, [employer] did not perform any customer shut-offs for non-payment of bills. This is 0% of the normal shut-off activity from May 11, 2005 to June 6, 2005, compared to 1,700 customer shut-offs during the same period in 2004. (Stip. #13.)

12. During the strike, [employer] performed meter readings at 81.2% of its normal rate, in comparison to the three full months prior to the strike. (Stip. # 12.)

13. Also, during the strike period, 75% of customers who were normally billed at their "Time of Use" were billed on time; the others were billed late because [employer] was unable to obtain meter reads. (Stip. #12.)

14. Completion of vehicle fleet preventative work orders was reduced to 47.8% of the normal number of average weekly work orders. This was measured by comparing the strike period weeks to all of the weeks prior to the strike in the same calendar year. (Stip. Exh. I.)

15. During the strike period, only 34.5% of [employer] information services' technology projects were able to be performed. (Stip. Exh. U.)

16. [Employer] did not perform any investigations into reported theft between May 16, 2005 and June 6, 2005, which was 0% of the normal 50 cases for such a time period. (Stip. #16.)

17. During the strike period, all of [employer]'s audit department's active projects were put on hold, reflecting a 0% performance on projects that would normally have proceeded during that time period. (Stip. Exh. O.)

18. Also, during the labor dispute, the non-union staff was unable to provide training, staffing, confidential administrative assistance or administrative support to all human resources activities, or to act in a number of other individual capacities, such as project managers and consultants. (Stip. #26.) Thus, the non-union staff's performance in these areas was 0% of their normal work activity during non-strike periods.

19. [Employer] did not hire any new employees for a three-week period just prior to and during the strike. In contrast, they were hiring an average of approximately 5 new people during each week from mid-January, 2005 to that point. This represents 0% of their normal hiring rate. (Stip. Exh. T.)

20. [Employer]'s legal department postponed filing reports with the Federal Energy Regulatory Commission and the Massachusetts DTE, reflecting 0% of its normal performance under non-strike circumstances. (Stip. Exh. V.)

21. [Employer] trained 16.1% as many employees during May, 2005, the month of the strike, compared to the month of February, 2005. (Stip. Exh. S.)

22. In 2005, [employer] was required to report to the state Department of Telecommunications and Energy (DTE) the percent of calls answered in thirty seconds or less. Compared to the average thirty-second answering rate for the prior three months, the answering rate during the strike was 80.5% of normal. (Stip. # 19; Stip. Exh. G.)

Ruling of the Board and Majority Opinion

I. Overview of the 'Substantial Curtailment' Test of Unemployment Insurance Eligibility in Labor Disputes.

In the present appeal, the Board must ascertain whether the claimants' unemployment was due to a work stoppage within the meaning of G.L. c. 151A, § 25(b), which provides, in pertinent part, as follows:

Section 25. [N]o ... benefits shall be paid to an individual under this chapter for—

(b) Any week ... with respect to which ... his unemployment is due to a stoppage of work which exists because of a labor dispute ...

The term "stoppage of work" is not defined in the statute. However, it has acquired a very definite meaning through judicial construction. As the Supreme Judicial Court has stated, in order for there to be a "'stoppage of work,' operations must be 'substantially curtailed.'" Hertz Corporation v. Acting Director of the Division of Employment and Training, 437 Mass. 295, 297 (2002), *citing* Reed Nat'l Corp. v. Director of the Division of Employment Security, 388 Mass. 339, 338 (1983). "How much disruption is required to constitute a substantial curtailment is a fact-specific inquiry; there is no percentage threshold or numerical formula." Hertz, 437 Mass. at 297. It is a matter of degree. Westinghouse Broadcasting Co., Inc. v. the Director of the Division of Employment Security, 378 Mass. 51, 55-56 (1979).

It has frequently been stated in the academic literature on the subject that the public policy rationale behind the unemployment insurance "work stoppage" eligibility test is to ensure that the state remains neutral in industrial conflicts. *See generally*, W. A. Lewis, The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence, 45 J. Urb. L. 319, 320 (1967). This doctrine is reflected in the structure of the labor dispute provisions in G.L.c.151A. Originally, § 25(b) disqualified any claimant whose unemployment was due to an active labor dispute. The Legislature amended the statute in 1937 to its present form to allow benefits if the strike does not result in a substantial curtailment of the employer's operations but to deny benefits if the strike does result in such a curtailment. *See Boguszewski*, 410 Mass. at 341.

Finally, it is significant that the "stoppage of work" balancing test in §25(b) calls for a different frame of analysis than is the case in most other unemployment insurance eligibility questions. When an employee is discharged or leaves work voluntarily, the focus of our attention is on the

employee's actions, intentions, and burdens. In labor disputes, however, our inquiry is centered on the employer's circumstances. This difference was made clear many years ago by the Supreme Judicial Court in the seminal case of General Electric Co. v. the Director of the Division of Employment Security, 349 Mass. 358 (1965). In summarizing the general trend of work stoppage cases in other jurisdictions with law provisions similar to that found in G.L.c. 151A, §25(b), the Court stated "the term 'stoppage of work' in the disqualification clause of statutes much like §25(b), 'refers to the effect upon the employer's operations produced by the labor dispute ... It does not refer to the cessation of work by the individual employee or employees.'" Ibid., at 363, *quoting*, Magner v. Kinney, 141 Neb. 122, 129-131 (1942) (emphasis supplied).

II. The Significance of the Nature of the Employer's Business in Measuring Curtailment.

Our approach to the question of whether there was a substantial curtailment in the employer's operations in the instant labor dispute is influenced by the fact that the employer's primary business is a critical public service function — the transmission of electricity and natural gas to individual and institutional customers. The company has a duty to maintain the delivery of these essential services, without interruption, irrespective of whatever personnel turbulence or other organizational vicissitudes it may be experiencing. As the SJC has suggested, this Board may properly choose in the case of such entities to weigh differently the three factors — production, revenues, and internal business operations — that collectively comprise the frame of analysis for determining whether a stoppage of work has occurred. Boguszewski, 410 Mass. at 345. Thus, as the Court observed, while a manufacturing firm that was experiencing a labor dispute might be tempted to simply curtail or halt production of its end product, a utility with a duty to the public to maintain production would prioritize the allocation of its available manpower differently, placing paramount emphasis on maintaining required production. Ibid. See also Lewis, 45 J. Urb. L. at 331 (noting that, due to the "unique nature of the operations" of utilities, "the weighing of factors such as operations is necessarily of another order from that of manufacturing firms").

This is the third time² in the past two decades that the Board has been asked to measure the effect of a strike on a large public service entity's operations. The two prior cases involved are the New England Telephone Company (NET) case, M-44845 and the companion case M-33872 (1993), as well as the Boston Edison case, M-27655-A (1987). Both matters were ultimately brought before the courts and our decisions³ on them were affirmed in Norrgard v. Nordberg & New England Telephone Company, No.1993-01-CV-203614 (Boston Municipal Court. June 25, 2007), and Boguszewski, 410 Mass. 337, respectively. These cases present substantially similar fact patterns: production continued largely unabated, and revenues were essentially unaffected, but in both instances the company's internal business operations suffered substantially as a consequence of the strike.

[Employer] is presently carrying on a portion of the business previously operated by Boston Edison. [Employer] no longer generates electricity like Boston Edison did, and may not be a "public utility" in the same technical meaning of the term that Boston Edison and NET were⁴. However, [employer] continues to perform Boston Edison's former functions of distributing and transmitting electricity to customers. Had [employer] curtailed electricity — or natural gas — distribution during the strike, the public would have been impacted in just the same fashion as would have been the case if Boston Edison had done so in that earlier strike. Thus, we view [employer]'s duty to maintain the supply of gas and electricity to its customers without interruption as being the same as Boston Edison's, or any other critical public service entity's duty.

During the strike, [employer] maintained its normal output of electricity and gas, and the facts show that its revenues remained relatively unchanged. "In cases where output and revenues are unaffected, high levels of disruption in support operations such as 'maintenance, inspection, testing, installation, replacement, clerical, and administrative functions' will constitute a 'substantial curtailment' of the employer's operations." Hertz, 437 Mass. at 300, *quoting Boguszewski*, 410 Mass. at 346. "[W]here a labor dispute blocks a substantial amount of work which would otherwise be done it ... is ... 'a stoppage of work.'" Boguszewski, 410 Mass. at 342-343, *quoting Adomaitis v. Director of the Department of Employment Security*, 334 Mass. 520, 524 (1956). Thus, in this appeal, the Board has measured the labor dispute's impact largely in terms of its effect on [employer]'s underlying business operations.

III. The Impact of the Strike on [employer]'s Operations.

A. Production.

[Employer]'s end product, the transmission of electricity, continued substantially uninterrupted during the strike. The company similarly continued to ensure that its customers received natural gas without interruption and it afforded them prompt service in gas emergencies throughout the labor dispute.

B. Revenues

The company's overall revenue stream was not substantially affected, continuing at 98% of normal. There was, however, a dramatic drop in collections on post-due accounts, which fell to 55.9% of pre-strike levels. This decline in post-due collections appears to have been attributable to the personnel-intensive nature of the collections function, as opposed to the largely automated nature of the routine billing payment functions.

C. Internal Business Operations

The strike had a very substantial impact on the company's internal support operations. With only 31.6% of its workforce present and 52.5% of its normal manpower hours being used, [employer] ceased performing entirely the following: work in engineering and construction on new customer work orders; routine and preventive maintenance; all service requests from existing gas and electric customers, except for those arising from emergencies and gas odors; customer shut-offs for non-payment; investigations into reported theft; audit team projects; hiring; filing mandated reports with the Federal Energy Regulatory Commission and the Massachusetts DTE; as well as ninety-five (95) exclusively management functions, and forty-five (45) functions performed exclusively by union personnel.

Other internal business operations functions did not stop being performed altogether but were carried out at significantly reduced levels. [Employer]'s ability to send out credit notices to delinquent customers was reduced to 58.8% of pre-strike norms. The employer completed only 47.8% of its fleet vehicle preventive work orders during the strike period. The volume of meter readings was reduced to 81.2% of normal pre-strike levels; customer call answering promptness dropped to 80.5% of normal, and billing of "Time of Use" customers dropped to 75% of normal. Performance on information services technology projects fell to 34.5% of normal; employee training dropped to 16.1% of normal.

Although [employer] made attempts prior to the strike to complete extra work in some areas of its internal business operations (such as new gas orders) in order to reduce the strike's impact on its customers, this does not call for a conclusion that the strike was, therefore, nondisruptive to the company's operations. Rather, it indicates quite the opposite, in our view. It appears that, precisely because the strike was expected to be highly disruptive to the company's business operations, steps were taken in advance of it to lessen the effects of this disruption on services to [employer's] customers.

IV. Comparison of [employer], Boston Edison (Boguszewski), and NET

We stated earlier that the instant case appears to have many parallels to two earlier cases before the Board involving labor disputes at public utilities. We now return to that frame of reference, and explore those parallels in greater detail.

A. Boston Edison (Boguszewski)

The first of our comparison cases involved a 28-day strike in 1986 against the Boston Edison Company. Boston Edison continued to supply electricity to its customers and collect revenues without significant disruption during the labor dispute, but the company experienced a substantial curtailment of its internal business operations. Consequently, this Board found that a "stoppage of work" occurred, and the SJC upheld that finding on appeal.

In our view, the extent of the labor dispute's impact on [employer] is very much like what the SJC stated had occurred in the Boston Edison strike:

[T]he board properly considered several factors in reaching its conclusion that there was a "stoppage of work." These factors included that 2,950 employees, or approximately two-thirds of the entire work force, ceased to work during the strike. Along with production of electricity, emergency service, and processing of customer payments, which were all maintained at normal levels during the strike, the board also considered maintenance, inspection, testing, installation, replacement, clerical, and administrative functions, which were either not performed ... or were performed at levels ranging from 3% to 50% of normal.

Boguszewski, 410 Mass. at 345.

At [employer], more than two-thirds of its workforce of 2,777 ceased to work during the strike. The company maintained normal delivery of electricity, gas, and emergency service; and its revenue inflows continued largely unabated. However, [employer]'s internal business operations and support functions were dramatically curtailed. All new work orders went unperformed; customer service shut-offs ceased; all non-emergency service orders went unfilled; both preventive and corrective maintenance were deferred; investigations and business improvement projects, hiring, training, legal work, and many other administrative functions were performed at levels ranging from 0% to 58.8% of normal.

B. NET

The NET case involved a three month strike in 1989 against the former regional telephone company. The company continued to provide ongoing telecommunications and emergency services to customers without interruption throughout the strike period. Customer billing was also unimpaired and, indeed, revenues actually increased over the course of the strike. However, the extensive reassignment of management employees to tasks previously performed by striking workers had a significant impact on the employer's internal business operations. Among the functions impaired by the strike were: telephone service installation and maintenance; non-emergency repairs; engineering; information technology operations; equipment upgrading and replacement; marketing; strategic planning; and human resources. See M-44845. The Boston Municipal Court recently affirmed the Board's conclusion that disruption of these functions in the NET labor dispute constituted a stoppage of work. Norrgard v. Nordberg, *op. cit.* (2007).

C. The Role of Strike Duration in These Three Cases

The [employer] strike only lasted for seventeen days, while the Boston Edison strike lasted for twenty-eight days, and the NET strike went on for three months. However, we find nothing in either our own prior decisions or the appellate case law in Massachusetts which suggests that the "substantial curtailment" test is subject to any form of durational standard. Indeed, in the NET

case, this Board expressly rejected such a durational approach. We reversed the then-Department of Employment and Training's determination that a work stoppage did not develop in the telephone company until the strike had reached its ninth week and concluded instead that because of the extent of the strike's disruption of the company's internal business operations, the work stoppage existed from the time the strike began. M-44845, (1993), *aff'd*, *ibid*.

Although the [employer] strike was manifestly shorter than either Boston Edison or NET, we think that the nature and extent of disruption caused to the employer's everyday internal business operations were substantially the same in all three cases. As in the present case, both Boston Edison and NET underwent a sharp reduction in staffing levels, with non-union and management personnel putting in large amounts of overtime. In all three cases, the companies experienced major delays and reductions in maintenance, repair, and discontinued services to customers; postponed capital projects; delayed or cancelled technology projects; cancelled scheduled work in legal, accounting, and human resources functions; and performed clerical and administrative functions at levels far below normal or not at all. Finally, in all three cases, the companies appear to have had the ability to continue delivering their core products indefinitely if need be, but they were only able to do so by redirecting resources away from internal business operations from the outset.

Conclusion

Taking into consideration the employer's duty to continue offering electric and gas services to the public without interruption, a majority of the Board concludes as a matter of law that the labor dispute substantially curtailed [employer]'s underlying business operations, and that the 2005 strike, therefore, amounted to a stoppage of work within the meaning of G.L. c. 151A, § 25(b).

The DUA determination is affirmed. The claimants are denied benefits for the weeks ending May 21, 2005 through June 4, 2005.

/s/

John A. King, Esq.
Chairman

/s/

Donna A. Freni
Member

*** DISSENT ***

The relevant determination here is whether the Board finds that the claimants' unemployment was due to a work stoppage within the meaning of G.L. c. 151A, § 25(b), which provides in part:

Section 25. No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for— ...

(b) Any week with respect to which the commissioner finds that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he was last employed; ...

"Stoppage of work" is specifically not defined in the statute or by the courts. The court explained, "[b]ecause of the variety of factual situations in which the labor dispute qualification may be invoked, we decline to define the term 'stoppage of work' any more precisely than it has already been defined in prior cases. There are no necessary, specific elements of the definition. The board should continue to follow an empirical approach, evaluating each situation on its facts, and applying the general requirement that there be a 'substantial curtailment' of the employer's operations in order for there to be a 'stoppage of work.'" Boguszewski v. the Commissioner of the Department of Employment and Training, 410 Mass. 337, 344 (1991) (citations omitted).

As the parties concede and the Board finds that [employer]'s end product of transmission of gas and electricity continued substantially during the strike and the employer's overall revenue stream was not substantially affected, the Board must consider the strike's effect on support or other non-essential operations.

In cases where output and revenues are unaffected, high levels of disruption in support operations such as "maintenance, inspection, testing, installation, replacement, clerical, and administrative functions" will constitute a "substantial curtailment" of the employer's operations, while lesser disruptions in those functions will not.

Hertz Corp. v. Acting Director of the Division of Employment and Training, 437 Mass. 295, 300 (2002). (citations omitted).

There was a curtailment of support operations. Hiring, customer shutoff-offs, fraud investigations, IT projects and required reports were reduced or eliminated. I am, however, mindful that the strike in this case lasted only a little over two weeks. The effect would be greater on support operations in a longer strike and would likely reach the 'substantial' threshold. Also important, it appears from a reasonable interpretation of the vast data cited that the employer took actions to blunt the effect of the strike on such support operations. As an example, the company maximized the number of new customer gas work orders completed in the first two weeks (pre-strike period) in May, 2005. See Exhibit Q. During the strike period, the company chose to perform no work on these work orders. See Stip. #17. Since the strike was short, the number of work orders completed in May, 2005 turned out to be greater than the number completed in April, 2005. This effort by the employer to reduce the effect of the strike, in this area and others, was a wise action by the employer taken to protect the interests of its

customers. It, however, demonstrates the ability and practice of the employer to manipulate its pre-strike and strike-workforce in a manner to prevent a substantial curtailment of the employer's operations. This would not have been possible or effective during a long strike, but proved to be successful for this short strike.

Other functions were not performed or were performed to a lesser degree by the employer during the strike period. See Exhibits W, X, Y and Z. These include corporate relations, finance and accounting, clerical and legal functions. These are certainly important functions, but amounted to holes in coverage given the short duration of the strike. The Supreme Judicial Court has ruled that holes in coverage will not create a stoppage of work. It reasoned:

Although certain functions went unperformed while managers and nonstriking workers filled in for the striking employees, a "stoppage of work" requires more than the holes in coverage that inevitably result when staff is temporarily diverted from one place to another.

Hertz, 437 Mass. at 299.

The Legislature, in amending section 39(d) of the Unemployment Insurance Law, did not intend for a strike to automatically disqualify employees from receiving unemployment benefits. The Supreme Judicial Court ruled:

If these sorts of disruptions sufficed to constitute a "stoppage of work," then virtually every strike would result in benefits disqualification, an outcome explicitly rejected by the Legislature when it revised the unemployment compensation statute in 1937. Compare St.1937, c. 421, § 1, with St.1935, c. 479, § 5 (amending statute from disqualifying any claimants whose unemployment is due to "strike, lockout or other trade dispute" to disqualifying only those whose unemployment is due to "stoppage of work")

Id. at 299.

During a strike, employees walk the picket lines rather than report to work. Given a productive workforce, this necessarily requires that certain functions cease. The employer here chose to allow functions which it considered less important to cease in a praiseworthy effort to continue the delivery of gas and electric to customers. Employees who exercise their right to strike should not be denied unemployment benefits because their employer chooses not to perform less crucial functions.

This is admittedly a close call. I am cognizant of the Supreme Judicial Court's offer in cases involving entities such as public utilities that "the board may be justified in weighing the factors differently-for example, by placing more weight on over-all operations than on end production-when it is evident that curtailment of end production in a utility has more significance than

similar curtailment by a manufacturing firm.” Boguszewski, 410 Mass. at 345. This case, however, was half the duration of that in Boguszewski and far shorter than in the Norrgard v. Nordberg & New England Telephone Company, No. 1993-01-CV-203614 (Boston Municipal Court, June 25, 2007) matter. Such a distinction is unnecessary in the present appeal to reach an appropriate result.

The closeness of the call, the short duration of the strike, and the pre-planning by the employer, together with the interpretive provision of G.L. c. 151A, § 74 (“[t]his chapter ... shall be construed liberally in aid of its purpose, which purpose is to lighten the burden which now falls on the unemployed worker and his family”), compels the result that there was not a substantial curtailment of the employer’s operations which amounted to a stoppage of work during this strike.

For the foregoing reasons, I respectfully dissent.

BOSTON, MASSACHUSETTS

DATE OF MAILING – December 11, 2008

/s/

Sandor J. Zapolin

Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT

(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT- January 12, 2009

JAK/rh

1 The exhibits submitted by the parties with the Stipulation of Facts are referenced, but not attached to this Decision.

2 We exclude the Boston Gas labor dispute of 1993 from our analysis, because it involved not a strike but a lockout; as provided in G.L.c. 151A, §25(b), employees who become unemployed as a consequence of a lockout are eligible for benefits irrespective of whether there is a stoppage of work.

3 As in the present appeal, our decisions in these earlier matters were rendered by a majority of the Board, but were not unanimous.

4 The claimants’ brief asserts, without providing a basis for doing so, that [employer] is ‘not’ a public utility. *See* Claimants’ Memorandum on Appeal, at 20. We do not profess to be experts in parsing the fine details of the varieties of corporate structure available to entities that are engaged in the delivery of gas and electricity in Massachusetts in the post-utility deregulation era, and we understand that [employer] is in fact a wholly owned subsidiary of a similarly named gas and electric holding company. *See* Brief of [XXX] Gas and Electric Corporation, at 2. However, as is explained above, we believe that for the purposes of work stoppage analysis, whatever distinctions may exist between [employer] and other ‘public utilities,’ as that term was traditionally defined, are distinctions without a difference.